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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45114
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-01-2017-1145
)	
DAVID ALEXANDER GREEN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Green failed to establish that the district court abused its discretion by imposing a unified sentence of seven years, with two and one-half years fixed, upon his guilty plea to possession of methamphetamine?

Green Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Green pled guilty to possession of methamphetamine and the district court imposed a unified sentence of seven years, with two and one-half years fixed. (R., pp.28-29, 44-47.) Green filed a notice of appeal timely from the judgment of conviction. (R., pp.55-57.)

Green asserts his sentence is excessive in light of his substance abuse issues and his acceptance of responsibility. (Appellant's brief, pp.2-4.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, "[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court." Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for possession of methamphetamine is seven years. I.C. § 37-2732(c)(1). The district court imposed a unified sentence of seven years, with two and one-half years fixed, which falls within the statutory guidelines. (R., pp.44-47.)

Green has an extensive criminal history that started as a juvenile with multiple charges and adjudications. (PSI, pp.3-5.) Green continued his criminal offending as an adult by being convicted of robbery at the age of 17, and has since accumulated five felony convictions and over 20 misdemeanor convictions. (PSI, pp.5-13.) Green has been sent to prison multiple times and served a period of retained jurisdiction, and successfully completed the following programs while incarcerated: Cognitive Self Change, Pre-Release Employability, Relapse Prevention, Parenting, Celebrate Recovery, Therapeutic Community, and After Care. (PSI, pp.14-15.) Green has also been given multiple opportunities to succeed on probation, but has performed abysmally each time. (PSI, pp.13-15.) The fact that Green claims to have accepted responsibility in this case and desires access to programming does not show an abuse of sentencing discretion, especially in light of his vast criminal history and prior programming opportunities.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Green's sentence, concluding, "So you need to decide whether you want to grow up and be an adult and live your life or if you want to chase drugs." (4/10/17 Tr., p.29, Ls.10-12.) The state submits that Green has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (4/10/17 Tr., p.27, L.16 – p.29, L.15 (Appendix A).)

Conclusion

The state respectfully requests this Court to affirm Green's conviction and sentence.

DATED this 18th day of December, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of December, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 raised around a substance abuse model. We know his
 2 mother was using most of his childhood and then he got
 3 to Pocatello into a very different situation and he was
 4 kind of on the streets, in a sense, at a very early age.
 5 He's been sort of couch surfing recently.
 6 He's had some kind of sporadic work history, and he's
 7 very honest he was using a quarter gram a day basically
 8 of methamphetamine. The other case he had the warrant
 9 out on, the state is dismissing, is another
 10 possession --
 11 THE COURT: Is he on parole?
 12 MR. LOSCHI: No, he is not on supervise right
 13 now.
 14 What we would like the court to do is to
 15 follow -- really his recommendation is my recommendation
 16 too -- of a one plus six, because that puts him in the
 17 queue for programming and it's making use of more
 18 productive time up there at the institution. I don't
 19 think there is anything about this possession -- I mean,
 20 the punishment really for his prior record is the fact
 21 that if they had been burglaries or grand thefts, maybe
 22 we are in a position the court might consider let's do
 23 probation or something like that here. I realize he has
 24 the record and history of violating supervision, so it's
 25 not viable to argue that.

27

1 thumbs for two-and-a-half years before he programs. I
 2 don't think that's going to do anybody good, he's going
 3 to have less supervision when he gets out. This will
 4 queue him up, put it in his pocket basically.
 5 Thank you, Judge.
 6 THE COURT: Thank you.
 7 Mr. Green, do you wish to make any
 8 statement to the court.
 9 THE DEFENDANT: No, thank you.
 10 THE COURT: Okay. Well, on your plea of guilty,
 11 I find you guilty. In an exercise of my discretion
 12 sentencing, I have considered the Toohill factors,
 13 including the nature of the offense and the character of
 14 the offender, as well as all the information in
 15 mitigation and aggravation.
 16 In determining an appropriate sentence, I
 17 do so mindful of the objectives of protecting society,
 18 achieving deterrence, the potential for rehabilitation
 19 and the need for retribution or punishment. I have
 20 reviewed and considered the pre-sentence investigation
 21 report. I've considered the arguments and
 22 recommendations of counsel. The defendant has been
 23 given an opportunity to allocute today and has declined.
 24 So, Mr. Green, this is -- I think
 25 Mr. Booker is right, this is a revolving door for you.

26

1 What I'm looking up in the prior record is
 2 I had gone through all his prior record, I know he had
 3 the '98 felony robbery, 2006 possession and '09
 4 agg assault. I had written down no agg battery. I can
 5 see in the PSI it has a case number in 2009, it's just
 6 2009 like 0005, and it says Count I, agg bat, five
 7 years. When I look back -- it's not Ada County, so when
 8 I look back on his ROA, I can't find that case number,
 9 but I did find --
 10 THE COURT: He has on '09 agg assault and '09
 11 agg battery, according to the PSI.
 12 MR. LOSCHI: I have '09 case FE-2009-10298, that
 13 was an agg battery and unlawful entry, and the agg
 14 battery was dismissed and that resolved as an
 15 misdemeanor. Then I have an 09-5753 case, which is an
 16 agg assault that he pled out on and was sentenced on.
 17 From what I'm seeing, I don't think he's got that agg
 18 battery, that may be an error.
 19 He's been in custody now since January 16.
 20 When you talked to him, he's very mild-mannered guy,
 21 very easy going, and he's very realistic about his
 22 position, where he's at right now and knows what he
 23 needs to do to stay out of system, which is to get clean
 24 and work some programming. I would you to -- if you
 25 give him three years fixed he's going to sit on his

28

1 I think your mom is right, it's time for you to grow up.
 2 I know she struggled with drugs herself, and granted
 3 that is not the best environment to grow up in and I've
 4 considered that and I recognize that sort of you had
 5 those two difficulties: One, growing up with parents
 6 who were substance abusers, I think your dad was gone
 7 from the picture, but your mom. And you also grew up
 8 where, in Iceland, is that right, and came back to the
 9 United States, Pocatello, I understand when you were 13,
 10 I think. I can understand that can be a pretty
 11 difficult transition to sort of be the new kid from a
 12 different country, and I get that.
 13 But the reality is is you're 36 years old.
 14 I mean, you've got to start make decisions for yourself
 15 that are going to keep you out of prison or you're just
 16 going to stay in this cycle; you're going to do time and
 17 you're going to get out and you're going to do time, and
 18 that will be your life. There's no do-overs, this is
 19 the one life you get, and if you spend it chasing drugs,
 20 you will simply find yourself in prison for most of your
 21 life, because you have used up all the runway that
 22 includes things other than prison for crime at this
 23 point.
 24 I think Mr. Booker is right, I think it
 25 would be an extraordinary event for you to commit a new

29

1 felony and not go back to prison. I appreciate the
 2 substance-use problems that you have, and those may
 3 contribute, and I'm sure they do, to your prior history,
 4 but, boy, you've got an awful history with pretty
 5 serious crimes and a long list of misdemeanors. You've
 6 been given pretty much everything we have to offer
 7 within the corrections system, Justice system:
 8 Probation, a Rider, probation, prison, parole. You've
 9 done it all.

10 So you need to decide whether you want to
 11 grow up and be an adult and live your life or if you
 12 want to chase drugs. I can't make that decision for
 13 you, the people in the prison can't make that decision
 14 for you, Mr. Loschi can't make that decision for you.
 15 You're going to have to make that decision.

16 So I'm going to sentence you to the
 17 custody of the Idaho State Board of Corrections, under
 18 the Unified Sentencing Laws of the State of Idaho, for
 19 an aggregate term of seven years. I'm going to specify
 20 a minimum period of confinement without the possibility
 21 of parole of two-and-a-half years fixed, followed by a
 22 subsequent indeterminate period of four-and-a-half
 23 years.

24 I am going to order that you be delivered
 25 to the sheriff -- or that you be in the custody of the

30

1 sheriff to be delivered to the proper agent of the state
 2 Board of Correction in execution of the sentence. Any
 3 bail is exonerated. Credit will be given for the days
 4 served prior to the entry of the judgment. I'll order
 5 you provide a DNA sample and right thumbprint impression
 6 and comply with the DNA Database Act, if you haven't
 7 already done so. I'll order that you pay court costs.
 8 I'm not going to order a find. I will order that you
 9 pay restitution in the amount of \$388.75.

10 You have the right to appeal. If you
 11 cannot afford an attorney, you can request to have one
 12 appointed at public expense. Any appeal must be filed
 13 within 42 days the date of this order or the entry of
 14 the written order of judgment of conviction and order
 15 imposing that sentence.

16 I do wish you the best of luck and I hope
 17 that you use this time to come up with a game plan to
 18 keep yourself clean and that then you follow that game
 19 plan and that you can live a quiet, peaceful life, drug
 20 free. Good luck.

21 (Proceedings concluded.)
 22 --oOo--
 23
 24
 25

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1 REPORTER'S CERTIFICATE
 2 STATE OF IDAHO)
 3 COUNTY OF ADA)
 4
 5 I, CHRISTIE VALCICH, Certified Court
 6 Reporter of the County of Ada, State of Idaho, hereby
 7 certify:
 8 That I am the reporter who transcribed the
 9 proceedings had in the above-entitled action in machine
 10 shorthand and thereafter the same was reduced into
 11 typewriting under my direct supervision; and that the
 12 foregoing transcript contains a full, true, and accurate
 13 record of the proceedings had in the above and foregoing
 14 cause, which was heard at Boise, Idaho.

15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand this 5th day of July, 2017.
 17
 18
 19
 20 _____
 21 CHRISTIE VALCICH, CSR-RPR
 22 Ada County Courthouse
 23 200 West Front Street
 24 Boise, Idaho
 25